84-1547

No.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

ALPHA PORTLAND INDUSTRIES, INC., and THE INSURANCE AND HEALTH PLAN FOR HOURLY EMPLOYEES OF THE ALPHA PORTLAND CEMENT CO.,
Petitioners,

vs.

ROBERT ANDERSON, JR., LOUIS BANK, EUGENE L. BERG, JAMES S. BERTELSMEYER, HOWARD BRUST, RAYMOND E. COPMAN, JOHN CRITTENDON, JAMES L. DAVIS, SR., ROBERT F. DEGROOT, MATHEW L. DELARBER, ROLAND E. DOYLE, MELVIN C. DOYLE, LESLIE M. DUNARD, WILLIAM J. EHRENREICH, PAUL H. EICHELMANN, FRANK D. GARDNER, JAMES GURLEY, VICTOR O. HOFFMANN, JAMES W. HOLMAN, SIDNEY J. HOLMAN, SR., WILLIAM J. HUIGHE, RICHARD H. JUERGENS, OLIVER KARG, JR., HARRY W. KENDALL, JOSEPH E. KREJCI, ARTHUR L. MARQUARDT, MELVIN V. MEINZ, LEO H. MOLL, OLIVER D. OGLESBY, DELBERT PRICE, TILLMAN RATTY, ALBERT L. REECE, JOHN L. ROSENER, AUGUST H. ROSENER, DONALD R. ROSSO, ALBERT M. SCHEIG, HARRY C. SCURLOCK, SR., LEROY C. SEITZ, LEROY H. SIMMONS, WILLIAM STAFFORD, EUGENE L. TURNER, FRED A. WALSH, EUGENE WEIBKING, JAMES D. WILLIAMS, CHARLES ZADOW, WILLIAM B. FISCHER, CHARLES M. GAPSCH, CARL MCCOY COLEMAN, STEVE H. DUGAN, JOSEPH D. GOODWIN, LILBURN C. DEGEARE, JACK RATTY, EDWARD A. MOELLER, LOUIS F. FRANKE, STEPHEN C. SIEBENMORGEN, ORVILLE USHER, JAMES P. CARTER, KEN SPANGENBERG, T. B. WHITENER, MAX W. SCHEIBE, CHESTER W. WILLIAMS, THOMAS N. ARGENBRIGHT, SIMON KIRN, WALTER LILLICRAP (deceased), FRANK MESPLAY, ROY W. MORRISON, SR., ADOLPH F. SCHREMP, and GEORGE F. WINCH,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

561

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QUESTIONS PRESENTED

1. Did the Court of Appeals correctly rule that retired employees are not required to exhaust the mandatory grievance procedures of the collective bargaining agreement that provides the benefits they are seeking?

2. Did the Court of Appeals properly apply *Schneider Moving & Storage Co. v. Robbins,* 80 L.Ed.2d 366 (1984) — a case involving trustees who were expressly permitted by the contract to institute litigation — to this case involving retirees and a mandatory arbitration agreement?

STATEMENT OF INTERESTED PARTIES

The Equitable Life Assurance Society of the United States was also a defendant in the district court. It was named as an appellee in the Court of Appeals, but plaintiffs did not raise any issues concerning Equitable there, and it made no appearance. There are no other interested parties who are not identified in the caption. There are no parent companies, subsidiaries (except wholly owned subsidiaries) or affiliates of petitioner Alpha Portland Industries, Inc.

TABLE OF CONTENTS

	Page
Questions Presented	i
Statement of Interested Parties	i
Table of Contents	iii
Table of Authorities	iv
Opinions Below	2
Jurisdiction	2
Statement Of The Case	2
Reasons For Granting The Writ	5
The Court of Appeals Incorrectly Held (a) That There Is No Presumption Of Arbitrability With Regard To Contractual Rights Of Retired Employees and (b) That The Rationale Of *Schneider* Applies To Retirees	5
Conclusion	9

Appendix:

A - Opinion of United States District Court for the Eastern District of Missouri, dated November 12, 1982	A-1
B - Opinion of United States Court of Appeals for the Eighth Circuit, dated January 10, 1984	A-8
C - Opinion of United States Court of Appeals for the Eighth Circuit, dated January 16, 1985	A-25

TABLE OF AUTHORITIES

Cases:

Allied Chemical & Alkali Workers, Local 1 v. Pittsburgh Plate Glass Co., 404 U.S. 157 (1971) 3, 6, 8

Local 589 v. Kellwood Co., 592 F.2d 1008 (8th Cir. 1979) 7

McLaughlin v. E-Systems, Inc., 403 F.Supp. 67 (N.D. Tex. 1975) 7

Republic Steel Corp. v. Maddox, 379 U.S. 650 (1965) .. 5, 6

Rosen v. Public Service Electric & Gas Co., 477 F.2d 90 (3rd Cir. 1973) 8

Schneider Moving & Storage Co. v. Robbins, 80 L.Ed. 2d 366 (1984) 3, 6, 9

Textile Workers of America v. Columbia Mills, Inc., 471 F.Supp. 527 (N.D.N.Y. 1978) 7, 8

United Steelworkers of America v. Canron, Inc., 580 F.2d 77 (3rd Cir. 1978) 7, 8

Vaca v. Sipes, 386 U.S. 171 (1967) 5, 9

Statutes:

28 U.S.C. §1254(1) 2

§301 Labor Management Relations Act, 29 U.S.C. §185 2

§502 ERISA, 29 U.S.C. §1132 2

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ALPHA PORTLAND INDUSTRIES, INC., and THE INSURANCE AND HEALTH PLAN FOR HOURLY EMPLOYEES OF THE ALPHA PORTLAND CEMENT CO.,
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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioners, Alpha Portland Industries, Inc., and The Insurance and Health Plan for Hourly Employees of the Alpha Portland Cement Co. request this Court to issue a writ of certiorari to review the order of the United States Court of Appeals for the Eighth Circuit dated January 16, 1985, which reversed the grant of summary judgment by the United States District Court for the Eastern District of Missouri.

OPINIONS BELOW

The District Court's order, dated November 12, 1982, is reported at 558 F. Supp. 913 and reproduced in Appendix A to this Petition. The majority, concurring and dissenting opinions of the three-judge panel of the Court of Appeals dated January 10, 1984, are reported at 727 F.2d 177 and reproduced in Appendix B. The majority and dissenting opinions of the Court en banc, reported at 752 F.2d 1293, are reproduced in Appendix C.

JURISDICTION

The judgment of the Court of Appeals was entered on January 16, 1985, and this Petition was filed within 90 days of that date. Jurisdiction in this Court is based on 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

This action was brought by a group of retired hourly employees who formerly worked for petitioner Alpha at a cement plant in St. Louis, Missouri. Certain collectively bargained agreements are the source of their claims for a right to receive life insurance and medical benefits for the rest of their lives. All of the respondents retired in or before December 1981, when Alpha closed its St. Louis cement plant because of financial problems. Alpha thereafter announced that it was terminating insurance benefits for retirees. This action was instituted under §301 of the Labor Management Relations Act, 29 U.S.C. §185, and §502 of the ERISA, 29 U.S.C. §1132, and respondents con-

tend that they are entitled to lifetime benefits under one or more of the collectively bargained agreements.

The insurance plan provided that disputes concerning the insurance program "shall be subject to the grievance procedure" of the collective bargaining agreement. The collective bargaining agreement, in turn, provided for a grievance procedure and, ultimately, for arbitration, and these remedies were deemed mandatory by the courts below, at least insofar as active employees are concerned.

The United States District Court for the Eastern District of Missouri granted summary judgment to petitioner by reason of respondents' admitted failure to exhaust the contractual grievance and arbitration procedure. Apdx. A. A divided three-judge panel of the Eighth Circuit reversed, holding that the union owes no duty to fair representation to retirees. Apdx. B. Alpha's petition for rehearing en banc was granted. After this Court's decision in *Schneider Moving & Storage Co. v. Robbins,* 80 L.Ed.2d 366 (1984), the en banc court reversed, with Judge Bright again dissenting. The majority held that there is no presumption of arbitrability for retirees, relying heavily on *Allied Chemical & Alkali Workers, Local 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971). The majority also read *Schneider* as carving out a giant exception to the presumption for virtually everyone except active employees:

> "We must conclude that retirees are more similarly situated with trustees than with active employees and are equally 'outside the collective bargaining relationship.' " Apdx. C at p. A-33.

The majority further ruled that in the absence of a presumption of arbitrability, the contract could not be construed as requiring exhaustion of grievance procedures because it referred only to employees and nowhere mentioned retirees.

Judge Bright dissented from both the panel and en banc opinions, contending that the majority had misconstrued *Schneider* and that the retirees were required to utilize the remedies provided in the contract which is the source of their claim.

REASONS FOR GRANTING THE WRIT

The Court Of Appeals Incorrectly Held (a) That There Is No Presumption Of Arbitrability With Regard To Contractual Rights Of Retired Employees And (b) That The Rationale Of *Schneider* Applies To Retirees.

Admittedly, the alleged rights being pursued by respondents have their origin in one or more collective bargaining agreements. In *Vaca v. Sipes*, 386 U.S. 171, 184 (1967), this Court said:

> "Since the employee's claim is based upon breach of the collective bargaining agreement, he is bound by terms of that agreement which govern the manner in which contractual rights may be enforced."

Clearly, if respondents were still actively at work, they would be subject to the exhaustion requirements of *Vaca*. The question presented by this case, therefore, is whether their status as ex-employees excuses them from that obligation. That question would appear to have been answered in the negative by *Republic Steel Corp. v. Maddox*, 379 U.S. 650 (1965). In *Maddox*, the Court held that a claim for severance pay—which necessarily could only be made by a former employee—was subject to the mandatory administrative remedies provided by the collective bargaining agreement. The Court applied the "general rule" which "requires that individual employees wishing to assert contract grievances must *attempt* use of the contract grievance procedure agreed upon by employer and union as the mode of redress." *Id.* at 652. The Court also applied the presumption of arbitrability to the contract in *Maddox*, ruling that language using the permissive "may" should be construed to require the use of the grievance procedure. The suggestion that claimants who had accepted the end of their employment as final should be free to avoid the contract procedure was rejected with the admonition that "any doubts must be resolved against such an interpretation." *Id.* at 659.

The Eighth Circuit in this case leaned heavily upon *Allied Chemical & Alkali Workers, Local No. 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971), and *Schneider Moving & Storage Co. v. Robbins*, 80 L.Ed.2d 366 (1984), to destroy the presumption of arbitrability recognized in the *Steelworkers Trilogy* and reinforced in *Maddox*. This was an unwarranted and inappropriate extension of this Court's decisions.

Allied Chemical merely held that unions and management are not required to bargain over a change in retirees' benefits. The Court expressly emphasized that the issue before it—whether retirement rights were the subject of mandatory collective bargaining—was distinct from the enforcement of retirement rights. 404 U.S. at 176 n.17. Thus, it was plainly improper for the Eighth Circuit to use *Allied Chemical* (or the fact that retirees are not part of a bargaining unit) to restrict *Maddox*. *See* Apdx. C at p. A-31.

Allied Chemical in fact noted that retirees' rights could be the subject of collective bargaining, and nothing in the Court's opinion suggested that such rights included in a collective bargaining agreement could be enforced outside the grievance procedure specified by that agreement. In short, the Eighth Circuit totally ignored the critical difference between a union's role in negotiating new benefits and its role in enforcing the benefits it has already negotiated.

The Eighth Circuit also misapplied *Schneider* to this case. *Schneider* involved a dispute between trustees of two multi-employer pension trusts and two employers. The trust agreement did not contain any arbitration provision but, in fact, provided that:

> "The board of trustees shall take such steps, including the institution and prosecution of, and intervention in, any legal proceedings as the trustees in their discretion deem in the best interest of the fund . . . ." 80 L.Ed.2d at 372.

The trustees had never been parties to or beneficiaries of the collective bargaining agreement. The trustees had never been represented by the union, and the union owed no statutory duty to, and had no contractual relationship with, the trustees. The trustees' rights were created by a separate instrument which made no reference whatever to the contractual remedies of any collective bargaining agreement. Since the agreements did not provide for any arbitration by trustees, and since the trustees were specifically authorized to file suit, the Court ruled that they were not subject to any exhaustion requirement.

Schneider is inapposite here. Here, the retirees had a long-standing relationship with a union which had negotiated the very benefits the retirees are seeking to extend. The insurance program which respondents are seeking to enforce specifically references the grievance procedure of the collective bargaining agreement, and it does not authorize independent court actions.

The decision below also conflicts with the analysis of a number of lower court decisions. In *McLaughlin v. E-Systems, Inc.*, 403 F. Supp. 67, 69 (N.D. Tex. 1975), the court expressly required retirees to exhaust their contractual remedies. In *Local 589 v. Kellwood Co.*, 592 F.2d 1008 (8th Cir. 1979), and *United Steelworkers of America v. Canron, Inc.*, 580 F.2d 77 (3d Cir. 1978), the arbitration of contract claims of retirees was specifically approved. *Kellwood* involved a dispute over pension rights, which the court held was arbitrable, saying: "where the parties have agreed to arbitrate all disputes requiring interpretation of a collective bargaining agreement, the question of arbitrability focuses upon whether the disputed obligation was arguably created by that agreement." 592 F.2d at 1011-12.

In *Textile Workers of America v. Columbia Mills, Inc.*, 471 F. Supp. 527 (N.D.N.Y. 1978), the employer relied on *Allied Chemical* in support of its contention, strikingly similar to the Eighth Circuit's analysis here, that there was no agreement to arbitrate grievances concerning retirees because the collective bargaining agreement referred to a difference between "the

employer and union or an employee." The Court in *Columbia Mills* rejected this contention and emphasized that the dispute there, as here, was properly between the employer and the union. It expressly rejected as illogical the suggested extension of a union's freedom to refrain from negotiating new provisions on behalf of retired employees to the point where any duty to represent them was eliminated, even with respect to the administration of contract terms negotiated before their retirement. The Court specifically stated, at 530-31:

> "Here, unlike [*Allied Chemical*], the issue is not whether the company must bargain with the union over the benefits of retired employees, but rather whether the company did, in fact, contractually commit itself to provide continuous insurance coverage for retirees for the duration of their natural lives. If the company made such a commitment in the collective bargaining agreement it entered into with the union, then under accepted contract principles the union has a legitimate interest in protecting the rights of the retirees and is entitled to seek enforcement of the applicable contract provisions. *United Steelworkers of America v. Canron, Inc.*, 580 F.2d 77, 80-88 (3d Cir. 1978)."

Accord, Rosen v. Public Service Electric & Gas Co., 477 F.2d 90 (3d Cir. 1973).

The suggestion by the Court of Appeals that arbitration is inappropriate here because this case involves the "law of the land" rather than the "law of the shop," Apdx. C at p. A-38, exemplifies the court's failure to comprehend that this case, like any other labor arbitration, turns on the meaning of a collectively bargained agreement between an employer and a union. The Eighth Circuit has created the anomalous and undesirable situation that an individual whose retirement benefits are altered two days before he retires is required to arbitrate his dispute but that an individual whose benefits are altered four days later need not do so.

Finally, the decision below would eviscerate the benefits of the *Steelworkers Trilogy* and hinder the federal courts. Many employers today are feeling the pinch of foreign competition, declining demand for certain products and, in some cases, obsolescence of facilities. Many members of the post-war work force have reached or are reaching retirement. As a result, the number of retirees has grown dramatically. If the decision of the Eighth Circuit in this case stands unreviewed by this Court, disputes by retirees, including but not limited to persons retired as a result of the large number of plant closings in the past few years, will clog the federal courts for years, rather than being relegated to the arbitral remedy designed to deal with matters of this type. Indeed, the Eighth Circuit's analysis is not limited to any particular kind of retiree disputes, and the Court of Appeals has thus abrogated any presumption of arbitrability for every individual medical expense or other benefit claimed by a retiree.

To prevent *Schneider* from being read as creating a giant loophole in the *Steelworkers Trilogy* and *Vaca v. Sipes,* this Court should grant certiorari and reverse the judgment of the Court of Appeals.

CONCLUSION

For the reasons stated, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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April 1, 1985

APPENDIX

APPENDIX A

Robert Anderson, Jr., et al.,
Plaintiffs,

v.

Alpha Portland Industries, Inc., et al.,
Defendants.

No. 82-1413C(4).

United States District Court,
E.D. Missouri, E.D.

Nov. 12, 1982.

On Motion for New Trial March 4, 1983.

MEMORANDUM

HUNGATE, District Judge.

This matter is before the Court on various pretrial motions.

Plaintiffs are all retired employees of the defendant Alpha Portland Industries, Inc. (Alpha) formerly employed by its division, Alpha Portland Cement Company at the division's St. Louis facility. Jurisdiction is invoked pursuant to the Employee Retirement Income Security Act (ERISA) § 502, 29 U.S.C. § 1132 and the Labor-Management Relations Act (LMRA) § 301, 29 U.S.C. § 185.

Also named as a defendant is the Insurance and Health Plan for Hourly Employees of Alpha Portland Cement Company; Alpha administers the aforesaid Plan, which is represented by the same counsel herein, and both entities will be referred to below collectively as Alpha. The Equitable Life Assurance Society of the United States (Equitable) is also named as a defendant.

Plaintiffs assert their claims as beneficiaries of certain collective bargaining agreements and related insurance agreements ex-

ecuted from time to time by Alpha and plaintiffs' union representatives, none of whom have been joined in this action. It is the retirees' contention that they are entitled to life insurance and hospitalization and surgical benefits enforceable under the agreements for the remainder of their lives. By their initial complaint, they seek mandatory injunctive relief and compensatory damages.

Due to adverse business conditions, Alpha either closed or sold the assets of its six remaining cement plants during the period from 1978 to September, 1982, including the St. Louis plant. Following consultations and negotiations with both the international and remaining local unions during 1981 and 1982, Alpha terminated the pertinent coverage effective May 1, 1982, upon expiration of all existing collective bargaining agreements. All retirees were notified of the proposed action March 29, 1982. Thereafter, Alpha concluded labor contracts with its existing employees to cover the period up to its liquidation of the remaining cement plants. These last agreements expressly excluded the benefits now in controversy.

Alpha moves for summary judgment pursuant to Rules 12(b)(1), 12(b)(6), and 56(a) of the Federal Rules of Civil Procedure. It is Alpha's contention that the rights in dispute are governed by labor contracts containing grievance procedures which culminate in binding arbitration. It states that plaintiffs have failed to exhaust these contractual remedies. Based on well-established principles favoring exhaustion of such remedies under federal labor and pension laws, Alpha contends that subject matter jurisdiction may not be assumed over this dispute.

Alpha correctly asserts that

> "It is settled principle that no action can be brought under 29 U.S.C. § 185(a) until a party attempts to exhaust his contractual remedies as to any claim." *Petersen v. Rath Packing Co.*, 461 F.2d 312, 315 (8th Cir.1972); *Bonnot v. Congress of Independent Unions Local # 14,* 331 F.2d 355 (8th Cir.1964). Exhaustion of nonjudicial remedies must

> be pled in a complaint. *Hayes v. New England Millwork Distributors,* 602 F.2d 15, 18 (1st Cir.1979).

International Molders and Allied Workers Union v. Aquarius Shoe Corp., 511 F.Supp. 361, 363 (E.D.Mo.1981); *see Republic Steel Corp. v. Maddox,* 379 U.S. 650, 85 S.Ct. 614, 13 L.Ed.2d 580 (1965); *United Steelworkers of America v. Warrior & Gulf Navigation Co.,* 363 U.S. 574, 80 S.Ct. 1347, 4 L.Ed.2d 1409 (1960).

The same requirement of exhaustion of contract remedies applies to suits under ERISA. *E.g., Challenger v. Local Union 1, International Bridge, Structural & Ornamental Ironworkers,* 619 F.2d 645, 647 (7th Cir.1980); *Amato v. Bernard,* 618 F.2d 559, 566-68 (9th Cir.1980); *Carpenters Local No. 1846 v. Pratt-Farnsworth, Inc.,* 511 F.Supp. 509, 515 (E.D.La.1981); *see Sample v. Monsanto Co.,* 485 F.Supp. 1018, 1019 (E.D.Mo. 1980).

It is plaintiffs' position that they are entitled to life-long insurance coverage because such benefits were "vested" upon their retirement and could not thereafter be defeated by Alpha's unilateral action or bargained away in subsequent negotiations. Alpha denies any such liability on a variety of grounds.

Regardless of the merits of these contentions, plaintiffs' central allegation is that Alpha failed to honor an alleged commitment made in the bargaining process:

> That the cancellation of said insurance coverage constitutes a violation of the prior collective bargaining agreements with plaintiffs' collective bargaining representatives under which plaintiffs retired, violates the terms of the various plans then extant and in effect at the time of retirement, and further violates the terms of the summary plan description.

Complaint ¶ 23.

Whatever rights they now assert stem from the "Insurance and Health Agreement of Alpha Portland Industries, as amended May 1, 1978, and its predecessor agreements (collectively referred to as the Insurance Agreement)." Complaint Exhibit 1. The agreement embodied in that exhibit was an appendix to the 1978 collective bargaining agreement (the Basic Agreement) executed by Alpha, the United Cement, Lime and Gypsum Workers International Union (the International Union) and the various local unions at Alpha's plants then operating throughout the country.

Sections 1 and 2 of Article XII of the 1978 Insurance Agreement specify the life insurance, hospitalization and surgical benefits available to Alpha retirees who retired during all periods commencing from November 1, 1948 up to April 30, 1979.

The Insurance Agreement at Article II, § 5, specifies that:

> Any difference arising under this Program respecting the administration, determination and/or implementation of the Program shall be subject to the grievance procedure established in the Basic Agreement beginning with Step 2 of such procedure.

Complaint Exhibit 1. Plaintiffs nowhere dispute that this suit concerns a difference respecting the administration, determination, and/or implementation of the "Program," as that term is elsewhere defined within the Insurance Agreement to include the benefits presently in controversy. The method for processing a grievance is clearly set out in the 1978 Basic Agreement for the St. Louis plant.

Plaintiffs' argument that binding arbitration is not required by these agreements is not persuasive. The Court is of the opinion that they are clear and unambiguous in establishing a binding method of dispute resolution. Alpha Exhibits 13-23, 26-28. *See Challenger, supra* at 647.

Plaintiffs also contend there are other reasons why they should not be bound by the grievance process. They cite their status as retirees, the dissolution of the local union, the St. Louis plant closure, and Alpha's alleged favorable negotiating position as to any such grievance, as reasons in support of the present litigation. (*E.g.*, Plaintiffs Price and Ratty affidavits).

None of these arguments excuses the required exhaustion of remedies. Plaintiffs' status as retirees does not distinguish their claims. Neither does it deny the international union's authority to vindicate their rights.

Plaintiffs mistakenly rely on *Allied Chemical & Alkali Workers of America v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 92 S.Ct. 383, 30 L.Ed.2d 341 (1971) for the proposition that the representational authority of the unions ceased upon their retirement. That case is inapposite:

> In *Pittsburgh Plate Glass,* the Supreme Court held that the retirement benefits of already retired employees were not a mandatory subject of bargaining under the National Labor Relations Act.
>
> * * * * * *
>
> The issue presented in this case is different than that considered in *Pittsburgh Plate Glass.* Here, unlike the latter cited case, the issue is not whether the Company must bargain with the Union over the benefits of retired employees, but rather whether the Company did, in fact, contractually commit itself to provide continuous insurance coverage for retirees for the duration of their natural lives. If the Company made such a commitment in the collective bargaining agreement it entered into with the Union, "then under accepted contract principles the union has a legitimate interest in protecting the rights of the retirees and is entitled to seek enforcement of the applicable contract provisions." *United Steelworkers of America, AFL-CIO v. Canron, Inc.*, 580 F.2d 77, 80-81

> (3d Cir.1978) (footnote omitted). For these reasons, the Third Circuit in *United Steelworkers of America v. Canron, Inc., supra,* recently affirmed a District Court Order directing that arbitration proceed between an employer and a union over the question of insurance coverage for retirees.

Textile Workers of America, AFL-CIO, Local 129 v. Columbia Mills, Inc., 471 F.Supp. 527, 530-31 (N.D.N.Y.1978); *see also Local 589, International Ladies' Garment Workers' Union, AFL-CIO v. Kellwood Company,* 592 F.2d 1008, 1011-12 (8th Cir.1979); *McLaughlin v. E-Systems, Inc.*, 403 F.Supp. 67, 69-70 (N.D.Tex.1975). The *Columbia Mills* opinion goes on to state at 531:

> Finally, the Company argues that the termination of the collective bargaining agreement and the cessation of operations by the Company renders arbitration ineffective and inappropriate. . . . However, in light of the Supreme Court's decision in *Nolde Brothers, Inc. v. Local No. 358, AFL-CIO* [430 U.S. 243, 97 S.Ct. 1067, 51 L.Ed.2d 300], *supra,* these arguments must be rejected.
>
> • • • • • •
>
> In the present case, as in *Nolde Brothers,* the dispute arises under the collective bargaining agreement since the underlying claim rests upon the proper interpretation to be given to the relevant contract provisions. Therefore, the fact that the collective bargaining agreement has been terminated, and the fact that the Company's operations have ceased does not provide a sufficient reason to bar arbitration of the grievance presented in this case.

As to the other reasons offered to excuse exhaustion, it is plaintiffs' burden to show why contract remedies have not been complied with and this record clearly does not do so. *Wolf v. National Shopmen Pension Fund,* 512 F.Supp. 1182, 1183

(E.D.Pa.1981); *see Ritter v. Western Electric Co.*, 504 F.Supp. 886 (E.D.Pa.1980) and cases cited therein. For example, plaintiffs may not rely, as they have attempted to, on the casual remarks of union officials to sidestep the established system of industrial self-governance. *Ritter, id.* at 890.

Finally, plaintiffs assert they formally requested continuation of the benefits by counsel's letter of June 1, 1982 (complaint exhibit 5). They argue that Alpha waived any right to insist on contractual remedies by failing to respond within 90 days with a written statement of the reasons for denial of what they allege was a "claim" for benefits. ERISA § 503(1), 29 U.S.C. § 1133(1), and 29 C.F.R. § 2560.503-1(a)(3). Plaintiffs have presumed that this satisfies the exhaustion requirement which is a precondition to any action in this Court. Plaintiffs more fully argue these points in their cross-motion for summary judgment against Alpha. The arguments are without merit. *Challenger, supra* at 648; *Wolf v. National Shopmen Pension Fund, supra* at 1183.

For all of the foregoing reasons, Alpha's motion for summary judgment will be granted.

Plaintiffs also seek relief against Equitable alleging that it was the insurance carrier under the Insurance Agreement and as such is a party-in-interest pursuant to ERISA § 3(14)(B); 29 U.S.C. § 1002(14)(B). In consequence of the Court's decision to grant summary judgment in favor of Alpha as to the underlying complaint, the claim against Equitable will be dismissed.

In view of these determinations, all other pending motions in this case will be denied as moot.

The Court's order of September 23, 1982, setting a hearing as to class certification in this matter will be vacated as moot.

APPENDIX B

Robert Anderson, Jr., et al.,
Appellants,
v.
Alpha Portland Industries, Inc., et al.,
Appellees.

No. 83-1358.

UNITED STATES COURT OF APPEALS,
EIGHTH CIRCUIT.

Submitted June 15, 1983.

Decided Jan. 10, 1984.

Rehearing En Banc Granted
Feb. 29, 1984.

Before BRIGHT and J.R. GIBSON, Circuit Judges, and HANSON,* Senior District Judge.

HANSON, Senior District Judge.

Plaintiffs are former employees of defendant Alpha Portland Industries, Inc. (Alpha). Plaintiffs claim insurance benefits under collective bargaining agreements in effect when they retired. Plaintiffs' action was dismissed below on summary judgment for failure to exhaust contractual remedies. Plaintiffs appeal. We reverse on the ground that plaintiffs are not required to exhaust the contractual remedies.

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* The HONORABLE WILLIAM C. HANSON, United States Senior District Judge for the Northern and Southern Districts of Iowa, sitting by designation.

I. FACTS

From 1941 to 1982 Alpha was engaged in the cement production business. During this period Alpha operated as many as ten cement plants, including the St. Louis plant at which plaintiffs were employed.

Plaintiffs worked for Alpha under collective bargaining agreements negotiated by the United Cement, Lime and Gypsum Workers (the Union). Plaintiffs retired at various times between 1955 and 1981. All collective bargaining agreements in effect when plaintiffs retired provided life and health insurance for active and retired employees. The collective bargaining agreements referred to a group insurance plan which was embodied in a separate insurance agreement. All collective bargaining agreements in effect when plaintiffs retired also contained grievance and arbitration procedures. These procedures varied during the period in which plaintiffs retired. The latest variation was as follows:

> When an employee has a grievance he shall . . . make an effort to arrive at a satisfactory settlement with his foreman. Failing to do so, he or his representative may take the matter up with the Plant Manager . . . . [T]he matter shall then be submitted in writing to the Director of Industrial Relations of the Company. After full consideration and such conferences as may be mutually agreed upon with a representative of the International Union of Cement, Lime and Gypsum Workers, the matter shall be considered settled when the employee's and the Company's representatives have reached an agreement. . . . . If an agreement cannot be reached in this manner, the matter may by mutual agreement be submitted to arbitration in such manner as shall be acceptable to both parties.

Earlier grievance and arbitration procedures were essentially similar but referred to different management personnel in the grievance procedure. After 1973 the insurance agreements pro-

vided that any insurance dispute would be subject to the grievance procedure in the collective bargaining agreement, beginning with step two.

Only one summary plan description of the insurance plan was in evidence below—one effective May 1, 1978. This summary plan description provided alternative procedures to appeal the denial of a claim. According to the summary plan description an appeal could be made through the grievance procedure in the collective bargaining agreement or by filing a written appeal with Alpha's personnel department.

As a result of financial problems, Alpha permanently closed its St. Louis plant in December of 1981, and the local union was dissolved. Subsequently, Alpha terminated insurance benefits for retirees.

Without exhausting their contractual remedies, plaintiffs' brought this action under § 301 of the Labor Management Relations Act (LMRA), 29 U.S.C. § 185, and § 502 of the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1132. Plaintiffs claimed a right to insurance benefits for the rest of their lives under the various collective bargaining agreements in effect when they retired.

After plaintiffs' action was filed, Alpha sold its last cement plant and has not operted any cement plants since.

After Alpha had sold its last cement plant, the district court, 558 F.Supp. 913, granted defendants' motion for summary judgment on the ground that plaintiffs had failed to exhaust their contractual remedies.

II. DISCUSSION

A. The Exhaustion Requirement.

As a general rule, employees claiming rights under a collective bargaining agreement are required to exhaust remedies provided in the collective bargaining agreement before bringing suit

against their employer under LMRA § 301, 29 U.S.C. § 185. *Clayton v. UAW*, 451 U.S. 679, 681, 101 S.Ct. 2088, 2091, 68 L.Ed.2d 538 (1981); *Warren v. International Brotherhood of Teamsters*, 544 F.2d 334, 337-38 (8th Cir.1976). Other circuits have applied this exhaustion requirement to suits under ERISA § 502, 29 U.S.C. § 1132. *See Kross v. Western Electric Co.*, 701 F.2d 1238, 1244 (7th Cir.1983); *Carpenters Local Union No. 1846 v. Pratt-Farnsworth, Inc.*, 690 F.2d 489, 527-29 (5th Cir.1982) (discussion assumes general exhaustion requirement); *Amato v. Bernard*, 618 F.2d 559, 566-68 (9th Cir.1980); Annot. 54 A.L.R.Fed. 364 (1981). *Cf. Air Line Pilots Ass'n v. Northwest Airlines*, 627 F.2d 272, 275-76 (D.C.Cir. 1980) (Railway Labor Act's arbitration requirement applied to suit to which ERISA and the Railway Labor Act both applied). We are persuaded to require exhaustion under ERISA by the Ninth Circuit's analysis in *Amato v. Bernard*, 618 F.2d 559. Since plaintiffs brought suit under LMRA and ERISA claiming rights under collective bargaining agreements, they are required to exhaust the grievance and arbitration provisions in those agreements, absent some exception to the exhaustion requirement.

B. Exception to the Exhaustion Requirement.

The exhaustion requirement is subject to exceptions. *Glover v. St. Louis—San Francisco Railway*, 393 U.S. 324, 329-30, 89 S.Ct. 548, 551-52, 21 L.Ed.2d 519 (1969); *Vaca v. Sipes*, 386 U.S. 171, 185-86, 87 S.Ct. 903, 914-15, 17 L.Ed.2d 842 (1967). An exception for the breach of a union's duty of fair representation has been recognized where the union has sole power to proceed with the contractual remedy and has wrongfully refused to proceed with an employee's complaint. *Id.* at 185, 87 S.Ct. at 914. An exception has also been recognized where exhaustion would be futile. *Glover*, 393 U.S. at 330, 89 S.Ct. at 551. One situation in which futility has been found is where it can be anticipated that a union in control of the contractual remedy would breach its duty of fair representation if the employee

were required to exhaust. For example, futility has been found where the employee's underlying complaint involves an accusation of wrongdoing against the union, *see Battle v. Clark Equipment Co.*, 579 F.2d 1338, 1345-46 (7th Cir.1978); *Hiller v. Liquor Salesmen's Union Local No. 2,* 338 F.2d 778 (2d Cir.1964); *see also Lerwill v. Inflight Motion Pictures, Inc.*, 582 F.2d 507, 511, 513 (9th Cir.1978), and where the union has breached its duty to the employee in previous cases, *see Waters v. Wisconsin Steel Works of International Harvester Co.*, 427 F.2d 476, 489-90 (7th Cir.) *cert. denied,* 400 U.S. 911, 91 S.Ct. 137, 27 L.Ed.2d 151 (1970).

If an actual or anticipated breach of the duty of fair representation by a union in control of the contractual remedy is sufficient to excuse exhaustion, then exhaustion should also be excused where the union is in control of the contractual remedy but owes no duty of fair representation to the plaintiff. A plaintiff should not be relegated to a remedy controlled by a party who owes the plaintiff no duty.

In this case the Union is in control of the contractual remedy under the provision of the grievance procedure that a grievance shall be considered settled when Alpha and the Union reach an agreement.

Because plaintiffs are retirees the Union owes them no duty of fair representation.

A union's duty of fair representation arises from its status as exclusive representative of the employees within the bargaining unit, which deprives individual employees of the ability to deal directly with their employer. *DelCostello v. International Brotherhood of Teamsters,* ____ U.S. ____, 103 S.Ct. 2281, 2290 n. 14, 76 L.Ed.2d 476 (1983); *Humphrey v. Moore,* 375 U.S. 335, 342, 84 S.Ct. 363, 367, 11 L.Ed.2d 370 (1964); *Smith v. Hussmann Refrigerator Co.*, 619 F.2d 1229, 1235 (8th Cir.), *cert. denied,* 449 U.S. 839, 101 S.Ct. 116, 66 L.Ed.2d 46 (1980). Thus the union's duty runs to the employees in the bargaining

unit. *Bowen v. United States Postal Service,* ____ U.S. ____, 103 S.Ct. 588, 597, 74 L.Ed.2d 402 (1983); *Hussmann,* 619 F.2d at 1235. It follows that the union owes no duty to persons who are not employees in the bargaining unit. This proposition is illustrated by *Cooper v. General Motors,* 651 F.2d 249 (5th Cir.1981). In *Cooper,* prior collective bargaining agreements provided that if an employee left the bargaining unit to become a supervisor and subsequently returned to the bargaining unit, the time spent as a supervisor would count toward the employee's seniority in the unit. A later collective bargaining agreement dropped this provision. Supervisors who were formerly members of the bargaining unit claimed that they had relied on the prior collective bargaining agreements in becoming supervisors and that the union had breached its duty of fair representation. The court held that the union owed no duty to the supervisors because they were not employees within the bargaining unit, even though the supervisors were formerly within the unit and the union had formerly negotiated benefits for them based on their status as former unit members.

In *Allied Chemical & Alkali Workers, Local Union No. 1 v. Pittsburgh Plate Glass Co.,* 404 U.S. 157, 92 S.Ct. 383, 30 L.Ed.2d 341 (1971), the Supreme Court made clear that retirees cannot be employees within a bargaining unit by holding that retirees are not "employees" within the meaning of the collective bargaining obligations of the National Labor Relations Act. The issue in *Allied Chemical* was whether the employer committed an unfair labor practice in dealing directly with retirees concerning their insurance benefits. The Court held that such dealing was not an unfair labor practice because the employer's duty to bargain collectively extended only to mandatory subjects of collective bargaining, that is, to the terms and conditions of employment of employees within the bargaining unit. The Court held that retiree benefits are not mandatory subjects of collective bargaining because retirees are not employees and retiree benefits do not vitally affect employees.

The Court's decision in *Allied Chemical* placed retirees outside of the bargaining unit and sanctioned direct dealing between employer and retirees. *See Local 134, UAW v. Yard-Man Inc.*, 716 F.2d 1476 at 1484-1486 (6th Cir.1983). It should follow that the union owes no duty of fair representation to retirees since the union's duty runs only to employees within the bargaining unit for whom the union acts as exclusive bargaining representative. The Court recognized this implication of its logic in noting that "since retirees are not members of the bargaining unit, the bargaining agent is under no statutory duty to represent them in negotiations with the employer." *Allied Chemical,* 404 U.S. at 181 n. 20, 92 S.Ct. at 398 n. 20; *see also Yard-Man,* 716 F.2d at 1486 n. 16. However, the *Allied Chemical* noted that a union may bargain for retiree benefits if it chooses to do so—retiree benefits remain a permissive subject of bargaining. *Allied Chemical,* 404 U.S. at 181 n. 20, 92 S.Ct. at 398 n. 20.

In *UMW Health & Retirement Funds v. Robinson,* 455 U.S. 562, 102 S.Ct. 1226, 71 L.Ed.2d 419 (1982), the Supreme Court made clear that by choosing to bargain for retiree benefits a union acquires no duty to retirees, at least as to the contents of the agreement ultimately reached with the employer. In *Robinson,* widows of retirees challenged the level of health benefits for retirees' widows provided in a collective bargaining agreement. The Court rejected this challenge stating:

> [F]ormer members and their families may suffer from discrimination in collective-bargaining agreements because the union need not "affirmatively . . . represent [them] or . . . take into account their interests in making bona fide economic decisions in behalf of those whom it does represent." *Chemical & Alkali Workers v. Pittsburgh Plate Glass Co.,* 404 U.S. 157, 181 n. 20 [92 S.Ct. 383, 398 n. 20].

Robinson, 455 U.S. at 574-75, 102 S.Ct. at 1233-34.

Defendants attempt to limit *Allied Chemical* and *Robinson* to the negotiation phase of the collective bargaining process. Defendants argue that if a union actually negotiates a collective bargaining agreement containing retiree benefits, the union then acquires a duty to fairly represent retirees in administering the agreement through such mechanisms as grievance and arbitration. The Supreme Court has recognized a distinction between the union's role in contract negotiations and its role in contract administration. *Allied Chemical,* 404 U.S. at 171 n. 11, 92 S.Ct. at 393 n. 11. Further, it has been held that a union can force an employer to arbitrate disputes concerning retiree benefits. *Local 589, International Ladies' Garment Workers' Union v. Kellwood Co.,* 592 F.2d 1008 (8th Cir.1979); *United Steelworkers v. Canron, Inc.,* 580 F.2d 77, 80-81 (3rd Cir.1978). However, a union could have power to force arbitration over retiree benefits due to the active employees' interest in those benefits and yet owe no duty to fairly represent retirees in arbitration over retiree benefits. In holding that the union may force arbitration over retiree benefits, the Third Circuit noted the Supreme Court's statement in *Allied Chemical* that the union "is under no duty to represent [retirees]." *Canron,* 580 F.2d at 81 n. 6.

The Supreme Court's decisions in *Allied Chemical* and *Robinson* contain broad language implying that a union owes *no* duty of fair representation to retirees, even in administering retiree benefits contained in a collective bargaining agreement. For example, the Court stated in both cases that the union is not required "affirmatively to represent non-bargaining unit members or to take account of their interests in making bona fide economic decisions in behalf of those whom it does represent." *Allied Chemical,* 404 U.S. at 181 n. 20, 92 S.Ct. at 398 n. 20; *Robinson,* 455 U.S. at 574-75, 102 S.Ct. at 1233-34. In discussing the protection for retirees when a union chooses to bargain for retirees benefits, the Court did not point to any union duty created when the union negotiates retiree benefits, rather the Court pointed to "established contract principles"

under which vested rights could not be altered without retirees' consent and to the fact that a retiree "would have a federal remedy under § 301 of the Labor Management Relations Act for breach of contract if his benefits were unilaterally changed." *Allied Chemical,* 404 U.S. at 181 n. 20, 92 S.Ct. at 398 n. 20.

In *Robbins v. Prosser's Moving and Storage Co.,* 700 F.2d 433 (8th Cir.), *cert. granted,* ____ U.S. ____, 104 S.Ct. 66, 78 L.Ed.2d 81 (1983), a majority of this court, sitting *en banc,* interpreted *Allied Chemical* to mean that a union has no duty to fairly represent retirees in administering retiree benefits contained in a collective bargaining agreement. The issue in *Robbins* was whether the trustees of an employee pension fund must exhaust contractual remedies before suing an employer for performance of the employer's obligations to the fund under a collective bargaining agreement where the dispute involves questions of contract interpretation. This court held that the trustees were not required to exhaust. Part of the court's rationale was that the union would not adequately represent the fund in contractual grievance and arbitration. In making this argument the court stated, "As the Supreme Court has held [in *Allied Chemical*], the union has no affirmative duty to represent those who are no longer members." *Robbins,* 700 F.2d at 442.

Imposing a duty on unions to fairly represent retirees in contract administration and requiring retirees to exhaust contractual remedies would have consequences that argue strongly for freeing unions of any such duty and excusing retirees from the exhaustion requirement.

As the Supreme Court noted in *Allied Chemical,* forcing a union to represent both active employees and retirees "would create the potential for severe internal conflicts that would impair the [bargaining] unit's ability to function and would disrupt the process of collective bargaining" because active employees and retirees "do not share a community of interest broad enough to justify inclusion of the retirees in the bargaining unit." *Allied Chemical,* 404 U.S. at 173, 92 S.Ct. at 394. The

dificulty for the union in representing both active employees and retirees is most apparent in the contract negotiation process. In contract negotiation the conflict of interest between the active employees and the retirees is made clear as the total benefits available from the employer are divided between active employees and retirees. Though the conflict is clearer in the negotiation process, there is also a conflict of interest between active employees and retirees in the contract administration process. In contract administration the union must choose which grievance to pursue with limited resources. More resources spent pursuing retiree grievances means less available for grievances of active employees. Further, a victory for a retiree in a contract administration matter may ultimately be paid for by the active employees. If a retiree victory reduces the employer's assets, there will be less available for future benefits to active employees.

In addition to creating difficulties for the union, the conflict of interest between active employees and retirees also threatens the retirees' interests. The threat is to the retirees' interests, not the active employees' interests, because of the politics of the situation. The union leadership has a political interest in serving the interests of the active employees because the active employees vote in union certification elections and union leadership elections. The union leadership has no political interest in serving the interests of retirees because retirees do not vote in union certification elections and generally do not vote in union leadership elections. *See generally Allied Chemical,* 404 U.S. at 174-75, 92 S.Ct. at 395-96; E. Clauge, B. Palli, L. Kramer, *The Aging Worker and the Union,* 124 (1971). Thus, the politics of the situation dictate that conflicts between the active employees and retirees will be resolved in favor of the active employees.

Imposing a duty on the union to fairly represent retirees would not adequately protect retirees. The Supreme Court noted in *Allied Chemical* that if a union represented both active

employees and retirees it could legitimately favor active employees at the expense of retirees. *Allied Chemical,* 404 U.S. at 173 & n. 12, 92 S.Ct. at 394 & n. 12. This is true because a breach of the duty of fair representation occurs only when the union's conduct is "arbitrary, discriminatory, or in bad faith." *Vaca v. Sipes,* 386 U.S. 171, 190, 87 S.Ct. 903, 916, 17 L.Ed.2d 842 (1967). Under this standard there is not necessarily any breach of the union's duty in supporting the position of one group within the bargaining unit against that of another. *Humphrey v. Moore,* 375 U.S. 335, 349, 84 S.Ct. 363, 371, 11 L.Ed.2d 370 (1964). This is justifiable where the individuals whose interests are slighted by the union at one point will derive benefits in the future from continued union representation. As the Supreme Court has noted, "The collective bargaining system . . . of necessity subordinates the interests of an individual employee to the collective interests of all employees in the bargaining unit." *Vaca v. Sipes,* 386 U.S. at 182, 87 S.Ct. at 912. However, it would be difficult to justify a union's favoring active employees over retirees in the administration of retiree benefits, given that the union has no duty to negotiate benefits for retirees in future collective bargaining agreements. *UMW Health & Retirement Funds v. Robinson,* 455 U.S. 562, 574-75, 102 S.Ct. 1226, 1233-34, 71 L.Ed.2d 419 (1982).

In this case, the problems generally created by the conflict of interest between active employees and retirees are mitigated by the fact that Alpha no longer has any active employees. However, a conflict of interest still exists. Since the local union has been dissolved, the international union would represent plaintiffs in the contractual grievance and arbitration procedures. Because the international represents the active employees of other employers, the international would face a conflict of interest in allocating its resources between the pursuit of plaintiffs' grievance and the pursuant of benefits for the active employees of other employers.

Imposing a duty on unions to fairly represent retirees in contract administration and requiring retirees to exhaust contractual remedies would also hurt the dispute resolution process itself. Even if there is no blanket exception to the exhaustion requirement for retirees, cases involving retirees will frequently raise difficult issues under other, generally applicable exceptions to the exhaustion requirement. Retiree cases will frequently raise issues as to whether the contractual remedy covers retirees, particularly where, as in this case, the contractual remedy is limited to employee grievances. A party can be required to exhaust only if the contractual remedy covers the dispute at issue. *UAW Local No. 125 v. IT & T Corp.*, 508 F.2d 1309, 1313 (8th Cir. 1975) ("[A] party cannot be required to submit to arbitration any dispute that he has not agreed to have arbitrated.") Further, retiree cases will frequently involve an issue as to whether the contractual remedy is available to retirees. In this case, this issue could be raised on two grounds. First, it could be argued that the contractual remedy is not available to retirees because it involves management personnel, such as foreman, who are not readily available to retirees. Second, it could be argued that the contractual remedy is not available to those retirees claiming rights under old collective bargaining agreements that contain grievance and arbitration procedures which have since been changed. Finally, retiree cases will frequently involve an issue as to whether exhaustion should be excused on the ground of futility due to the conflict of interest between retirees and active employees. *Cf. Trustees of Local 478 Trucking and Allied Industries Pension Fund v. Siemens Corp.*, 721 F.2d 451, 455 (3rd Cir. 1983). Given all these issues, retiree cases would frequently require a mini-trial in federal court to determine whether exhaustion is required. This would defeat one of the purposes of the exhaustion requirement: providing an expeditious remedy. *See Boys Markets, Inc. v. Retail Clerks Union, Local 770,* 398 U.S. 235, 249, 90 S.Ct. 1583, 1591, 26 L.Ed.2d 199 (1970). It would certainly be more expeditious to recognize a blanket exception from the exhaustion requirement for retirees.

Defendants' final argument is that the collective bargaining agreements and insurance agreements require plaintiffs to exhaust the contractual remedies even if the union owes them no duty. As this court noted in *Robbins*, the exhaustion requirement is fundamentally a matter of contract. As a general rule, exhaustion is required or not required as the parties have agreed in the collective bargaining agreement. *Robbins*, 700 F.2d at 442. The parties to a collective bargaining agreement could provide that retirees must exhaust contractual remedies controlled by the union before suing the employer. However, absent a union duty of fair representation to retirees, such a requirement would amount to a provision that the union and the employer have absolute control over retiree benefits at all times. Due to the drastic effect of an exhaustion requirement on retirees, a contractual exhaustion requirement will be found only where it is provided in express words that retirees must exhaust contractual remedies before suing the employer. *See Robbins*, 700 F.2d at 442.

There is no such express provision in this case. Prior to 1973 the only provision submitting any dispute to the grievance and arbitration procedure was the grievance and arbitration provision itself. The grievance and arbitration provision merely provided, "When an employee has a grievance he shall...." This does not expressly require exhaustion. Further, this provision does not expressly refer to retirees. Indeed, the language "when an employee has a grievance" suggests that the grievance and arbitration procedure is limited to active employees. This suggestion is supported by the structure of the grievance procedure which includes grievances to "his foreman" and the Plant Manager. After 1973, the insurance agreements provided that any insurance dispute would be subject to the grievance procedure in the collective bargaining agreement, beginning with step 2. This provision does not expressly require exhaustion. If the insurance agreements covered only retirees, this reference to the grievance procedure in the insurance agreements would be, in effect, an express reference to retirees. However, both active

employees and retirees were covered by the insurance agreements, and the insurance agreements' references to the grievance procedure do not expressly cover retirees. The references to the grievance procedure in the insurance agreements may have been intended to provide only that insurance disputes would be subject to the grievance procedure if otherwise within the grievance procedure, that is, if they constituted grievances by active employees. Finally, the 1978 summary plan description of the insurance plan calls into question whether the parties intended to require exhaustion of the grievance and arbitration procedures in the case of insurance disputes. The summary plan description provided alternative procedures to appeal the denial of a claim: the grievance procedure or a written appeal filed with Alpha's personnel department. Under this provision, the grievance procedure is not an exclusive remedy for insurance disputes, and exhaustion is required only where contractual remedies are exclusive. *Vaca v. Sipes,* 386 U.S. at 184 n. 9, 87 S.Ct. at 913 n. 9. Given the ambiguities as to whether the parties intended to require exhaustion of contractual remedies in the case of retiree insurance disputes, we should not require exhaustion on the ground that the parties required it.

III. CONCLUSION

The district court's grant of summary judgment is reversed and the case is remanded for further proceedings on the merits.

JOHN R. GIBSON, Circuit Judge, concurring.

I concur in the majority opinion, in part because I believe that *Robbins v. Prosser's Moving & Storage Co.,* 700 F.2d 433 (8th Cir. 1983), a decision of this court sitting en banc, compels that I do so. I joined Judge Henley's dissent in *Robbins,* and am aware that the Supreme Court has granted certiorari in *Robbins.* Any further instruction from the decision of the Supreme Court can be considered by the district court upon the remand we are ordering.

BRIGHT, Circuit Judge, dissenting.

I dissent.

The parties to the collective bargaining agreement and insurance agreement at issue specifically contracted to submit disputes to a grievance and arbitration procedure. Absent some exception to the general rule, employees claiming rights under the collective bargaining agreement must first exhaust exclusive remedies provided in the agreement. *See Clayton v. Automobile Workers,* 451 U.S. 679, 681, 101 S.Ct. 2088, 2091, 68 L.Ed.2d 538 (1981). The majority opinion excepts plaintiffs from the exhaustion requirement because, as retirees, the union owes them no duty of fair representation. Although an exception to the exhaustion requirement may sometimes exist when retirees claim rights under the collective bargaining agreement, *see, e.g., Robbins v. Prosser's Moving & Storage Co.,* 700 F.2d 433 (8th Cir.) (en banc), *cert. granted,* ____ U.S. ____, 104 S.Ct. 66, 78 L.Ed.2d 81 (1983),[1] I do not believe the exception extends to this case.

Although unions do not have a statutory duty to represent retirees in negotiating a new collective bargaining agreement, they may negotiate for benefits for retirees as a permissive subject of bargaining. *Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass,* 404 U.S. 157, 181 n. 20, 92 S.Ct. at 398 n. 20 (1971). In the 1978 collective bargaining agreement, the union bargained for retirees to receive health benefits and life insurance. As part of the agreement, the parties specifically contracted to resolve disputes through a grievance and arbitration procedure. Because the union bargained for benefits for retirees and specifically agreed to submit disputes to the arbitration process, it has a legitimate interest in representing the retirees in arbitration. *Cf. United Steelworkers of America v. Canron, Inc.,* 580 F.2d 77, 80-81 (3d Cir. 1978).

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[1] The author of this dissent joined the majority in *Robbins.*

The facts of this case can be distinguished from this court's recent decision in *Robbins v. Prosser's Moving & Storage Co., supra,* 700 F.2d at 433, a case relied upon by the majority. Although the *Robbins* court held that pension fund trustees were not bound by the arbitration process because the union owed retirees no duty of fair representation, it limited the reach of its decision, stating,

> Certainly it is true that arbitration, pension funds, and health and welfare funds, are all matters of contract. They either exist or not as the parties have agreed in the collective-bargaining contract and related documents. If the agreements in the cases before us provided in express words that trustees' claims could not come to court before questions of contract interpretation had been settled by arbitration, this would be quite a different case. *Id.* at 442.[2]

The collective bargaining agreement in the present case does provide for a mandatory grievance and arbitration process to resolve disputes,[3] and the insurance agreement at issue expressly provides,

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[2] The agreement in *Robbins* provided,

> [the] Trustees shall take such steps, including *institution and prosecution of,* and intervention in, any *legal proceedings* that the Trustees in their discretion deem in the best interest of the fund to effectuate the collection or preservation of contributions or other amounts which *may be* owed to the trust fund, without prejudice, however, to the rights of the Union to take whatever steps which may be deemed necessary for such purposes. 700 F.2d at 442 (emphasis supplied).

[3] The collective bargaining agreement in this case provides,

> If an agreement cannot be reached in this manner, the matter may by mutual agreement be submitted to arbitration in such manner as shall be acceptable to both parties.

Despite the permissive "may" in the clause, this court has held that arbitration clauses of this nature are mandatory. *See Bonnot v. Congress of Independent Unions,* 331 F.2d 355, 359-60 (8th Cir. 1964) (permissive "may" in arbitration clause merely allows aggrieved party choice of pursuing or abandoning claim).

> Any difference arising under this Program respecting the administration, determination and/or implementation of the Program shall be subject to the grievance procedure established in the Basic Agreement***.

Thus, unlike the union in *Robbins,* the union in this case expressly contracted to arbitrate disputes arising under the agreement.

In exempting the plaintiffs from the exhaustion requirement, the majority also relies upon *Allied Chemical Workers, supra,* and *Robbins, supra,* for the proposition that retirees may bypass arbitration procedures when the union owes them no duty of fair representation. In those cases, however, the courts focused in part upon a potential conflict between the interests of retirees and the active employees as a basis for their decisions. The Supreme Court in *Allied Chemical Workers, supra,* stated,

> [T]he risk cannot be overlooked that union representatives on occasion might see fit to bargain for improved wages or other conditions favoring active employees at the expense of retirees' benefits. 404 U.S. at 173, 92 S.Ct. at 394.

See also Robbins, supra, 700 F.2d at 442.

In this case, however, no potential conflict exists between the interests of retirees and active employees. Alpha Portland Industries has closed all its cement plants and no longer employs any workers. With the potential conflict between retirees and active employees removed, the argument that the union will not live up to its contractual obligation to represent the retirees in arbitration carries no weight.

The district court properly determined that the retirees had failed to exhaust their contractual remedies. Accordingly, I would affirm the district court conditioned upon the district court's retaining jurisdiction in the event that arbitration procedures cannot be carried out. This reservation reflects some question in the record whether arbitration can proceed without the existence of local unions to represent the retirees, and is a question best left to the district court to decide.

APPENDIX C

Robert Anderson, Jr., et al.,
Appellants,

v.

Alpha Portland Industries, Inc., et al.,
Appellees.

No. 83-1358

UNITED STATES COURT OF APPEALS,
EIGHTH CIRCUIT

Submitted Sept. 11, 1984.

Decided Jan. 16, 1985.

Before LAY, Chief Judge, HEANEY, BRIGHT, ROSS, McMILLIAN, ARNOLD, JOHN R. GIBSON, FAGG and BOWMAN, Circuit Judges, En Banc.

JOHN R. GIBSON, Circuit Judge.

The issue before the court en banc is whether retired employees of Alpha Portland Industries, Inc., must exhaust grievance procedures before making claims for insurance benefits under a plan provided for in the collective bargaining agreements in effect when they retired. The district court required exhaustion, 558 F.Supp. 913 (E.D.Mo. 1982), but a panel of this court reversed. 727 F.2d 177 (8th Cir. 1984). We granted rehearing en banc, and we reverse the district court.

The appellants, plaintiffs below, are retired employees of an Alpha cement plant in St. Louis. They worked under collective bargaining agreements, negotiated by the United Cement, Lime and Gypsum Workers, which provided life and health insurance

for active and retired employees through reference to a group insurance program embodied in a separate agreement. The appellants had all retired prior to December 1981 when, because of financial problems, Alpha closed its St. Louis cement plant (Alpha sold its last cement plant in September 1982 and no longer operates any such plants). The local union was then dissolved, and shortly thereafter Alpha announced it was terminating insurance benefits for retirees. Plaintiffs brought this action under section 301 of the Labor Management Relations Act, 29 U.S.C. § 185 (1982), and section 502 of the Employee Retirement Income Security Act (ERISA), *id.* § 1132, claiming the right to lifetime insurance benefits under the agreements in effect when they retired.

The insurance plan since 1973 essentially had provided that "[a]ny difference arising under this Program respecting the administration, determination and/or implementation of the Program shall be subject to the grievance procedure established in the [collective bargaining agreement] beginning with Step 2 of such procedure."[1] A summary description of the insurance plan, however, distributed by Alpha to employees and retirees effective May 1, 1978, stated that an appeal from a denial of insurance benefits could be made through the grievance procedure *or* by filing a written complaint with the personnel department.

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[1] The district court apparently looked to this language in holding that the contracts were "clear and unambiguous in establishing a binding method of dispute resolution." 558 F.Supp. at 916. This approach, however, presumes Alpha's underlying argument that retiree rights continued to be subject to change with each new collective bargaining agreement. If, as plaintiffs contend, benefits vested upon retirement, those individuals leaving the company before 1973 might not be bound by this subsequently added language "clearly and unambiguously" mandating exhaustion of the grievance procedure. Since, however, our interpretation of the most recent contract differs from that of the district court, it is unnecessary for us to examine also the language of earlier less-explicit contracts.

The grievance procedure provided as follows:

> All employees shall at all times make an effort to perform their duties in such manner as to promote the efficient operation of their department and the plant as a whole. When an employee has a grievance, he shall * * * make an effort to arrive at a satisfactory settlement with his foreman. Failing to do so, he or his representative may take the matter up with the Plant Manager. Should these representatives of the Company and the individual employee or his representative fail to agree, the matter shall then be submitted in writing to the Manager of Industrial Relations of the Company. After full consideration and such conferences as may be mutually agreed upon with a representative of the International Union of Cement, Lime and Gypsum Workers, the matter shall be considered settled when the employee's and the Company's representatives have reached an agreement.
>
> * * * * * *
>
> If an agreement cannot be reached in this manner, the matter may by mutual agreement be submitted to arbitration in such manner as shall be acceptable to both parties. The decision of an impartial arbitrator shall be final and binding upon both parties.

The district court entered summary judgment in favor of Alpha on the basis that the retirees' suit was barred by their failure to exhaust this contractual remedy.

Our approach is governed by the recent Supreme Court decision in *Schneider Moving & Storage Co. v. Robbins,* ____ U.S. ____, 104 S.Ct. 1844, 80 L.Ed.2d 366 (1984). In *Schneider,* trustees of two multiemployer employee-benefit trust funds brought an action to enforce contribution and audit provisions

against certain participating companies. The district court dismissed the suit pending exhaustion of remedies under the relevant collective bargaining agreements, but the Supreme Court reversed. In reaching its conclusion, the Supreme Court first rejected the applicability of a presumption in favor of arbitrability and then found that there was no express contractual language requiring, nor any indication of intent by the parties to require, exhaustion in regard to trustee claims relating to the fund. Thus, proceeding likewise, we look first to whether there is a presumption in favor of arbitrability as to grievances of retirees and then address the issues of contractual interpretation.[2]

I.

The Supreme Court has held that, in light of national labor policy, contracts between unions and employers should be interpreted with a presumption in favor of requiring arbitration. *United Steelworkers v. American Manufacturing Co.*, 363 U.S. 564, 80 S.Ct. 1343, 4 L.Ed.2d 1403 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 80 S.Ct. 1347, 4 L.Ed.2d 1409 (1960); *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 80 S.Ct. 1358, 4 L.Ed.2d 1424 (1960). Alpha argues that this presumption should extend to this case and that *Schneider* is distinguishable in that it dealt not with retirees but with trustees "outside the collective bargaining

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[2] We recognize that the obligation to invoke grievance procedures is a matter of contract. *Schneider,* 104 S.Ct. at 1847 n. 5 (quoting *Robbins v. Prosser's Moving & Storage Co.*, 700 F.2d 433, 442 (8th Cir.1983)); *Atkinson v. Sinclair Ref. Co.*, 370 U.S. 238, 241, 82 S.Ct. 1318, 1320, 8 L.Ed.2d 462 (1962). In *Delaney v. Union Carbide Corp.*, 749 F.2d 17 at 19 (8th Cir.1984), however, we distinguished *Schneider* as being a case in which "there was no clear agreement for the submission to arbitration of disputes" between trustees and employers. *Schneider,* rather than *Delaney,* controls here for that reason. *See infra* section II.

relationship."[3] Alpha, however, then proceeds without discussion to cite cases and quote language in a fashion so as to equate retirees with "employees" and "the union." We cannot agree that *Schneider* divides the world of labor plaintiffs into "trustees" and "non-trustees" with the presumption of arbitrability applying to all but the former; the issue instead is whether the retirees here are more similarly situated with the trustees in *Schneider* or with active employees and their unions as to whom arbitration generally has been required.

The Supreme Court in *Allied Chemical & Alkali Workers Local No. 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 172, 92 S.Ct. 383, 394, 30 L.Ed.2d 341 (1971), held that retirees are not "employees" within the meaning of the National Labor Relations Act, 29 U.S.C. §§ 151-168 (1982), and cannot properly be joined with active employees in a collective bargaining unit.

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[3] Alpha offers two additional grounds for distinction that merit little discussion. First, it argues that *Schneider* involved interpretation of a trust agreement rather than of a collective bargaining agreement as here. That, however, is not an accurate characterization of this dispute. The insurance plan is embodied in a separate contract and pursuant to ERISA is treated as a trust, with Alpha as a fiduciary, even if collectively bargained. *See In re Vorpahl*, 695 F.2d 318, 320-21 (8th Cir.1982). Furthermore, the Supreme Court in *Schneider* specifically stated that its rule as to trustee-employer disputes applies "even if those disputes raise questions of interpretation under the collective-bargaining agreements." 104 S.Ct. at 1849 (footnote omitted). Second, Alpha argues that *Schneider's* rejection of the presumption in favor of arbitrability does not extend to cases where, as here, there is no contract language giving plaintiffs the express right to resort directly to court. The Supreme Court, however, in the relevant passage of its opinion, does not mention this factor. *Id.* ERISA grants a statutory right to sue. 29 U.S.C. § 1132. To suggest that this legal right should be deemed waived in favor of mandatory arbitration if it is not made express in the contract reads back into *Schneider* the very presumption in favor of arbitrability that the Supreme Court rejected. In *Schneider* it is exhaustion of contractual remedies, not the right to sue, that must be express. *E.g., Schneider*, 104 S.Ct. at 1850.

Alpha seeks to avoid the import of this case by limiting it to the obligation to bargain on behalf of retirees, arguing that once a union chooses, as is still permissible, to so bargain, it then has an interest in enforcing the contract and thus the authority to represent retirees in grievance and arbitration proceedings. The cases Alpha cites, however, *e.g., United Steelworkers v. Canron, Inc.*, 580 F.2d 77, 80-81 (3d Cir.1978); *Textile Workers Local 129 v. Columbia Mills,* 471 F.Supp. 527, 530-31 (N.D.N.Y.1978), support only the proposition that a union has standing to assert retirees' rights under a collective bargaining agreement to which it is a party *if it chooses* and that an employer may not refuse to arbitrate its contractual obligations with the union. These cases do not establish that a union which does bargain for its retirees becomes their *exclusive* representative and that the retirees then *must* proceed through the union.[4] In contrast, the Sixth Circuit has held that retirees may settle a claim against the company under the collective bargaining agreement even while the union has a suit pending on the issue. *International Union, UAW v. Yard-Man, Inc.*, 716 F.2d 1476, 1484-85 (6th Cir.1983), *cert. denied,* ____ U.S. ____, 104 S.Ct. 1002, 79 L.Ed.2d 234 (1984).

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[4] Alpha at one point argues that the duty to represent individuals in grievance procedures arises from contract and cites this passage from a footnote in *Bowen v. U.S. Postal Serv.*, 459 U.S. 212, 225 n. 14, 103 S.Ct. 588, 596 n. 14, 74 L.Ed.2d 402 (1983): "When the collective-bargaining agreement provides the union with sole authority to press an employee's grievance, the union acts as the employee's exclusive representative in the grievance-arbitration procedure." The opening clause quoted, plus earlier language in the footnote, make clear that this exclusive representative status follows only when the contract establishes the grievance procedure as an exclusive remedy so that individual workers may no longer deal directly with the company. This argument thus presumes the issue—the proper interpretation of the contract—to be determined here. *Cf. Schneider,* 104 S.Ct. at 1851 n. 22.

Alpha cites *Republic Steel Corp. v. Maddox,* 379 U.S. 650, 85 S.Ct. 614, 13 L.Ed.2d 580 (1965), as supporting its argument that individuals who are no longer members of the collective bargaining unit may still be required to invoke contract grievance procedures to settle disputes with the company. *Republic Steel,* however, involved a worker who had been laid off and was seeking severance pay under the collective bargaining agreement. The Supreme Court, in holding that that situation was not sufficiently different from grievances in general to justify an exception to the exhaustion requirement, said that use of contractual remedies would "complement[] the union's status as *exclusive* bargaining representative." *Id.* at 653, 85 S.Ct. at 616 (emphasis added). The Court found that issues concerning severance could have a significant effect on future union-company relations and could "inhibit" negotiations on subsequent collective bargaining agreements. *Id.* at 656, 85 S.Ct. at 618.

Allied Chemical, however, does answer both of these contentions.[5] A union, the Supreme Court held, is not the *exclusive* bargaining representative for retirees even when, as there, the insurance benefits modified by the company originally had been established through collective bargaining: The company did not commit an unfair labor practice by directly contacting retirees and proposing changes in the health plan. 404 U.S. at 183-88, 92 S.Ct. at 399-02.

The Supreme Court in *Allied Chemical* also found a union's interest in retirement benefits, unlike its interest in the severance provisions in *Republic Steel,* much more "speculative" because present employees would have no assurances that they were advancing their own interests by advancing pensioners' interests.

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[5] The Supreme Court in *Allied Chemical* specifically distinguished individuals who, while not presently "employees" for some reason, were active members of the work force available for hire from individuals who had ceased work with no expectation of any further employment. 404 U.S. at 168, 92 S.Ct. at 392.

They would have no guarantee of similar representation when they retired because active workers would not be bound to continue to bargain for retiree rights and could give up such rights and benefits in favor of more immediate interests. *Id.* at 181-82, 92 S.Ct. at 398-99. *Cf. Republic Steel,* 379 U.S. at 656, 85 S.Ct. at 618.[6]

Alpha responds that reconciling such conflicting interests of different groups of employees is exactly the province of a union. It relies on, among other precedents, *Humphrey v. Moore,* 375 U.S. 335, 349-50, 84 S.Ct. 363, 371-72, 11 L.Ed.2d 370 (1964); *Ford Motor Co. v. Huffman,* 345 U.S. 330, 337-39, 73 S.Ct. 681, 685-86, 97 L.Ed. 1048 (1953); and *Buchholtz v. Swift & Co.,* 609 F.2d 317, 328 (8th Cir. 1979) (Heaney & Bright, JJ., concurring in denial of rehearing en banc), *cert. denied,* 444 U.S. 1018, 100 S.Ct. 672, 62 L.Ed.2d 648 (1980). These cases, however, involve varying priorities among active employees who, despite differences, had been found to have sufficiently similar interests to make them an "appropriate bargaining unit" in the contemplation of the National Labor Relations Act. In contrast, the Supreme Court in *Allied Chemical* held that retirees and active employees lacked the necessary "mutuality" or "community" of interests necessary to "assure the coherence among employees necessary for efficient collective bargaining and at the same time prevent a functionally distinct minority group of employees from being submerged." 404 U.S. at 172-73, 92 S.Ct. at 394. The cases cited by Alpha do not justify letting a union mediate the interests of a "functionally distinct minority" which cannot be made part of the bargain-

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[6] The Supreme Court on several occasions has acknowledged congressional concerns with ensuring that trust funds are managed in the interests of beneficiaries and not directed to the purposes of either union or management. *See United Mine Workers Health & Retirement Funds v. Robinson,* 455 U.S. 562, 571-72, 102 S.Ct. 1226, 1232, 71 L.Ed.2d 419 (1982); *NLRB v. Amax Coal Co.,* 453 U.S. 322, 331, 333-34, 101 S.Ct. 2789, 2795, 2796, 69 L.Ed.2d 672 (1981).

ing unit and which, as the Supreme Court pointed out, does not have a vote in union affairs. *Id.* at 175, 92 S.Ct. at 395.[7]

Finally, the Supreme Court holding in *Allied Chemical* that retiree benefits are only permissive and not mandatory topics for bargaining, 404 U.S. at 187, 92 S.Ct. at 401, eliminates concerns with inhibition of negotiations and with economic warfare. Retirees have no recourse to economic weapons other than a hope that active employees will strike in their behalf, a hope that was also available to the trustees in *Schneider,* who were similarly seeking to protect future interests of present employees and to enforce a contract to which the union was a party. The Supreme Court there, however, held this to be "no recourse." 104 S.Ct. at 1849. We must conclude that retirees are more similarly situated with trustees than with active employees and are equally "outside the collective bargaining relationship.[8] A presumption in favor of arbitrability again

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[7] The existence of an actual conflict between the union and the retirees here, argued by the parties in debating whether exhaustion otherwise required should be excused, is not relevant in the context of determining whether the presumption of arbitrability is even applicable or in interpreting the contract on that point. *Allied Chemical* clearly deals with the high probability of conflict in general making it improper for retirees and active employees ever to be joined in a collective bargaining unit, without regard to the specific circumstances. Furthermore, the demise of Alpha's cement plant and resulting dissolution of the unit of active employees cannot influence the meaning of a contract, written when the business was operating, as to whether retirees must exhaust contractual remedies in the collective bargaining agreement.

[8] "[T]he relationship of retiree and employer is unadorned with those special considerations peculiar to the relationship between an active employee, his union and the employer" since disputes will not affect the terms and conditions of employment as to which collective bargaining is mandatory and since retiree claims generally will rest on vested contractual rights as to which the "common strength" of a union is not needed for enforcement. *International Union, UAW v. Yard-Man, Inc.,* 716 F.2d 1476, 1485 (6th Cir. 1983), *cert. denied,* ____ U.S. ____, 104 S.Ct. 1002, 79 L.Ed.2d 234 (1984).

would further the "national labor policy of peaceful resolution of labor disputes***only indirectly, if at all." *Id.* The presumption then likewise is "not a proper rule of construction in determining whether arbitration agreements between the union and the employer apply to disputes between [retirees] and employers, even if those disputes raise questions of interpretation under the collective-bargaining agreements." *Id.*[9]

II.

Unaided by such a presumption, the contract language here cannot be read as requiring exhaustion of grievance procedures by retirees. As in *Schneider,* the relevant provisions address only grievances of "employees" and speak only of "employees" initiating the contractual dispute resolution procedures.[10] For much the same reasons as cause us to reject applicability of a presumption in favor of arbitrability, we also "will not engage the unlikely inferences that the parties to [this] agreement[ ] intended to require [retirees] to rely on the Union" to handle their

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[9] Such a presumption may have been expressed in our earlier panel opinion, *Anderson,* 727 F.2d at 180, *but see id.* at 184-85, and would have been consistent with the position taken by other circuits. *E.g., Challenger v. Local Union No. 1, Int'l Bridge, Structural & Ornamental Ironworkers,* 619 F.2d 645, 647 (7th Cir. 1980); *Amato v. Bernard,* 618 F.2d 559, 567 (9th Cir. 1980). All of those cases, however, were decided without the guidance of the Supreme Court's opinion in *Schneider.* We believe *Schneider* compels both the analysis and the result that we express here.

[10] The arbitration clause in *Schneider* was to apply "should differences arise between the Company and the Union or any employee of the Company." *See Robbins v. Prosser's Moving & Storage Co.,* 700 F.2d 433, 442 n. 8 (8th Cir. 1983), *aff'd sub nom. Schneider Moving & Storage Co. v. Robbins,* ____ U.S. ____, 104 S.Ct. 1844, 80 L.Ed.2d 366 (1984).

grievances. *Schneider,* 104 S.Ct. at 1851; *see id.* at 1850-51.[11] Furthermore, the context in which the grievance procedure is presented in the Alpha-Union contract makes any construction applying it to retirees even more strained. The article entitled "Handling of Complaints" begins, "All employees shall at all times make an effort to perform their duties in such manner as to promote the efficient operation of their department and the plant as a whole. When an employee has a grievance, he shall ...." The initial steps in the grievance procedure (only the first of which is to be skipped for insurance claims) all involve taking complaints to a foreman or plant manager, individuals not convenient to retirees, who do not even have a "workplace." *Cf. Friedrich v. Local No. 780, International Union of Electrical, Radio & Machine Workers,* 515 F.2d 225, 228 (5th Cir. 1975) (machinery of grievance procedure "clearly oriented exclusively toward employee initiated disputes' as opposed to complaints raised by the company); *Affiliated Food Distributors v. Local Union No. 229, International Brotherhood of Teamsters,* 483 F.2d 418, 421 (3d Cir. 1973) (collective bargaining agreement not susceptible to a "fair construction" that it covered company-initiated grievances when grievance procedure would require company to refer its complaint to a union steward who would then present it back to a company official), *cert. denied,* 415 U.S. 916, 94 S.Ct. 1412, 39 L.Ed.2d 470 (1974).

The only language bearing on the necessity of exhaustion present in this instance but absent in *Schneider* is the clause in the insurance plan making claims thereunder "subject to" the

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[11] In our panel opinion we underscored the inherent conflicts in relegating retirees to an exclusive remedy of arbitration controlled by a union which owes them no duty of fair representation. 727 F.2d at 183; *see also Robbins v. Prosser's Moving & Storage Co.,* 700 F.2d 433, 442 (8th Cir. 1983), *aff'd sub nom. Schneider Moving & Storage Co. v. Robbins,* ____ U.S. ____, 104 S.Ct. 1844, 80 L.Ed.2d 366 (1984).

grievance procedure in the collective bargaining agreement. This clause, however, does not expressly refer to exhaustion for *retirees* and need not be read as so expanding the scope of the grievance procedure. The "subject to" language instead merely directs all persons covered by the insurance plan, employees and retirees alike, to the separate collective bargaining agreement for use of the grievance procedure *if otherwise applicable. See Anderson,* 727 F.2d at 185. As we have discussed, the grievance procedure is not applicable to retirees.

In addition, any implication that exhaustion is mandatory as to retirees is undermined by the reference in the summary plan description to filing of a written complaint as an alternate means of challenging a denial of insurance benefits. Alpha argues that this language can be given no effect because the terms of the insurance plan are controlling and the summary description cannot add to a beneficiary's rights. The case which Alpha cites in support of this position, however, *O'Brien v. Sperry Univac,* 458 F.Supp. 1179 (D.D.C. 1978), held only that there is no federal *jurisdiction* under 29 U.S.C. § 1132 when a claim arises under the summary description rather than under the insurance plan itself.[12] In a footnote, in fact, the court specifically preserved the question of whether plaintiffs might be entitled to some relief "under the terms of the summary plan description." *Id.* at 1180 n. 1. In any event, we are using the summary description not to add to the terms of the insurance plan but to illuminate the meaning and the intent of the parties when they crafted the "subject to" language, as discussed above. We find no justification for inferring that the reference to the grievance procedure is mandatory for retirees in light of the language and structure of the grievance procedure itself, *see*

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[12] This holding has been rejected in other circuits. *E.g. Gors v. Venoy Palmer Mkt.,* 578 F.Supp. 365, 368 (E.D. Mich. 1984).

Schneider, 104 S.Ct. at 1850, and evidence of contemplation of alternate avenues of appeal.[13]

Our conclusion that the language of the contract does not mandate exhaustion of the grievance procedure is in no way altered by *Bonnot v. Congress of Independent Unions Local No. 14,* 331 F.2d 355 (8th Cir. 1964). The Alpha contract provides that, as the last step of the grievance procedure, the dispute "may by mutual agreement" be submitted to arbitration. In *Bonnet* we held that in certain circumstances the term "may" merely allows that an employee may choose not to pursue his grievance but that if he does pursue it, he must seek arbitration. *Id.* at 359. Assuming that the Alpha contract were susceptible to this interpretation, the resulting mandatory arbitration provision still would apply only to individuals who

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[13] Alpha also cites *Van Orman v. American Ins. Co.,* 680 F.2d 301 (3d Cir. 1982), for the proposition that the insurance plan alone contains the beneficiaries' rights and may not be altered by the summary description. The disclaimer accompanying the summary description in that case, however, was quite strong: "Complete details of the Plan are contained only in the Company's Revised Retirement Plan Dated April 1, 1957, which instrument governs the Plan* * *. All statements in the foregoing outline and explanations are qualified by reference to the Plan itself." *Id.* at 304. In contrast, Alpha qualifies its summary description only by stating that:

> [t]he purpose of this summary is to describe the Plan to you in nontechnical terms. It is intended to give you enough information to answer most of the questions you are likely to have. However, if we covered every detail of the Plan, it would no longer be a summary, but as technical as the full text itself; so if you have a specific question you should consult the Plan document.

To find that the Alpha insurance plan, even if it embodies all beneficiary rights, is not a total integration as to remedies would seem consistent with the purposes of 29 U.S.C. § 1022 (1982), which requires that the summary plan description include accurate information on the remedies available when insurance claims are denied. *See* H.R.Rep. No. 533, 93d Cong., 1st Sess., *reprinted in* 1974 U.S. Code Cong. & Ad. News 4639, 4649; S.Rep. No. 127, 93d Cong., 1st Sess., *reprinted in* 1974 U.S.Code Cong. & Ad. News 4838, 4847.

were required to use the grievance procedure in the first place. Here, we have held that the language of the contracts does not require that retirees even initiate the grievance procedure, let alone reach the last step of arbitration. *Bonnot* has little bearing on our issue.

Congress in enacting ERISA declared a policy of protecting employee benefit plan participants by providing "ready access to the federal courts." 29 U.S.C. § 1001(b) (1982). Furthermore, there are strong practical reasons for allowing retirees to bring ERISA suits without first exhausting contractual remedies. The expertise of arbitrators is in the "law of the shop, not the law of the land," i.e., trusts, *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 57, 94 S.Ct. 1011, 1024, 39 L.Ed.2d 147 (1974), and arbitration might not result in a final decision. *Alexander, supra; cf. Clayton v. International Union, UAW*, 451 U.S. 679, 691-93, 101 S.Ct. 2088, 2096-97, 68 L.Ed.2d 538 (1981) (exhaustion of internal union remedies not required when member could not obtain relief sought). Finally, question might be raised as to whether mandatory arbitration would meet statutory requirements as to opportunities for fiduciary review of denials of benefit claims. 29 U.S.C. § 1133 (1982).

We find that the insurance plan here does not, through either express language, intent or presumption, require exhaustion of contractual remedies by retirees seeking disputed benefits. We thus reverse the grant of summary judgment in favor of Alpha. The retirees are entitled to pursue their claims in federal court.

BRIGHT, Circuit Judge, dissenting.

Previously, I filed a dissent to the panel opinion in this case, *Anderson v. Alpha Portland Industries, Inc.*, 727 F.2d 177, 185-187 (8th Cir. 1984), and I adhere to that dissent.

The panel's opinion relied in part on *Robbins v. Prosser's Moving & Storage Co.*, 700 F.2d 433 (8th Cir. 1983) (en banc) to

support its determination that a union owes no duty of fair representation to retirees. I disagree because that opinion did not take cognizance of the limited scope of our holding in *Robbins.* In *Robbins,* we recognize that under certain circumstances, a union might be required to arbitrate on behalf of the trustees of various health and welfare funds. We stated:

> Certainly it is true that arbitration, pension funds, and health and welfare funds, are all matters of contract. They either exist or not as the parties have agreed in the collective-bargaining contract and related documents. If the agreements in the cases before us provided in express words that trustees' claims could not come to court before questions of contract interpretation had been settled by arbitration, this would be quite a different case.

Id. at 442.

The Supreme Court granted certiorari in *Robbins* and affirmed the judgment of this court. *Schneider Moving & Storage Co. v. Robbins,* ____ U.S. ____, 104 S.Ct. 1844, 80 L.Ed.2d 366 (1984). I believe the Court's opinion preserves the limited nature of our holding in *Robbins.* The Court stated:

> There simply is no evidence that the Union owes any statutory or *contractual duty* of fair representation to the trustees. In the absence of such evidence, we will not engage the unlikely inference that the parties to these agreements intended to require the trustees to rely on the Union to arbitrate their disputes with the Employer. (Emphasis added) (footnotes omitted).

Id. at 1851.

In the instant case, as I have previously observed, the insurance agreements provide for arbitration by explicit language: "Any difference arising under this Program respecting the administration, determination and/or implementatioin of the Program shall be subject to the grievance procedure established in

the Basic Agreement * * *." Thus, I think the district court properly determined that the retirees had failed to exhaust their contractual remedies.

I would affirm the district court, subject to the district court retaining jurisdiction in the event arbitration procedures cannot be carried out because of the closing of the cement plant and the dissolution of the local union.